RE TAN TYE, DECD.; TAN LIAN CHYE v. BRITISH AND MALAYAN TRUSTEES LTD.

[F.C. (Tan Ah Tah F.J., Chua and Winslow JJ.) March 23, 1966]

[Singapore — Federal Court Civil Appeal No. Y6 of 1965]

Landlord and Tenant — Agreement to licence and authorize the running of business of an amusement park on land — Whether a licence or a tenancy — Whether exclusive possession of the land and premises conferred on licensee — Profits a prendre.

This was an appeal against the decision of Buttrose J. who held that on a consideration of the agreement as a whole it constituted a licence personal to the licensee and did not create a lease or a tenancy ([1966] 1 M.L.J. 74). The agreement in this case purported to give a licence of part of the Gay World Amusement Park to one Goh Eng Wah on terms and conditions to be approved by the court. It was common ground that the trustees had no power to grant a lease of the land and premises and they sought the approval of the court for the grant of the licence.

Held: as in this case no exclusive possession of the land and premises had been conferred on the licensee and as moreover no profit of the nature of a profit *a prendre* was conferred on the licensee, the agreement constituted a mere licence and was rightly approved by the court.

Cases referred to:—

(1) *The Queen* v. *Morrish* (1863), 32 L.J.M.C. 245.

(2) *Smith* v. *Lambeth Assessment Committee* (1882), 10 Q.B.D. 327, C.A.

(3) *Cobb* v. *Lane* [1952] 1 All E.R. 1202.

(4) *Errington* v. *Errington* [1952] 1 K.B. 298.

(5) *Roads* v. *Overseers of Trumpington* 6 Q.B. 63.

(6) *Facchini* v. *Bryson* [1952] 1 T.L.R. 1389.

(7) *Frank Warr and Co. Ltd.* v. *London County Council*, [1904] 1 K.B. 713.

(8) *Clore* v. *Theatrical Properties Ltd. & Westby & Co. Ltd.* [1936] 3 All E.R. 483.

FEDERAL COURT.

Philip Hoalim Sr. for the appellant.

N. A. Mallal (*Y. R. Jumabhoy* with him) for the respondents.

Cur. Adv. Vult.

Winslow J.: This is an appeal against the oral judgment of Buttrose J. delivered on 7th October, 1965 in which he held that an agreement dated 12th August, 1965 between the respondents of the one part and one Goh Eng Wah of the other (hereinafter referred to as "the agreement") constituted a licence personal to the said Goh Eng Wah and did not create a lease for five years of the land and premises referred to therein.

The appellant is one of the beneficiaries of the estate of Tan Tye deceased and represents both himself and the majority of the income beneficiaries of the said estate of which the respondents are the present trustees in whom the said land and premises are vested. The latter form part of a larger terrain of apparent felicity known formerly as the Happy World and now as the Gay World Amusement Park. Five buildings in the park, including buildings housing the Happy Cabaret, Tai Thong Restaurant and a number of cinemas, have been excepted from the purview of the agreement and with these, therefore, I am not concerned.

It is common ground that, earlier in 1965, Buttrose J. held that the trustees had no power to grant a lease of the Gay World Amusement Park and indicated that the trustees might consider granting a licence of part of the park on terms and conditions to be approved by the court. It is also common ground that the testator's will does not empower the trustees to sell, mortgage or otherwise encumber the property in question.

I therefore, propose to proceed with this appeal on the basis that the trustees cannot and should not grant a lease of the said land and premises. The question which I have to decide, therefore, is whether the agreement is a lease or a licence. If it is a lease then the court should not approve it. The majority of the income beneficiaries contend that it is, in fact, a lease which should not be approved. The corpus beneficiaries, who were represented by Mr. K. C. Chan in the court below, accepted the position that the trustees had no power to grant a lease but agreed with the trustees that the agreement was a licence and nothing more.

The appellant states, in his affidavit of 29th September, 1965 that he and the majority of the income beneficiaries are of the opinion "that it would be more to the advantage of the estate without a licence which of course would involve the trustees in more work for the estate". According to Mr. Philip Hoalim, Sr., counsel for the appellant, the gist of this complaint is that the income beneficiaries would stand to lose financially if a licence were granted, and that they would rather have the trustees do the work themselves without interposing a licensee who would minimise their income. It therefore, suited their book to complain that the agreement constituted a lease and not a licence because the court had already previously indicated that it would not approve a lease.

It is small wonder, therefore, that Mr. Hoalim made admirably strenuous efforts, with all the industry he could command, accompanied by his accustomed flow of rhetoric, to convince the court that their contention was correct. Other counsel concerned in the case, both in the court below as well as before this court, were no less enthusiastic in presenting the fruits of their diligence in support of the opposite view. Between them all, therefore, they have presented a comprehensive picture of the fine distinctions that

divide a licence from a lease and I must acknowledge my indebtedness to them.

I now turn to an examination of the agreement, in the light of the numerous authorities cited, in order to determine whether it is a licence or a lease. Fortunately, I have also had the advantage of having come across two other authorities, which appear to me to be of some assistance in the context of the circumstances of this particular case, and have helped to fortify me in the decision at which I have arrived. They are *The Queen* v. *Morrish* [1] and *Smith* v. *Lambeth Assessment Committee* [2] to which I shall refer in due course.

As Denning L.J. said in *Cobb* v. *Lane*: [3]

"The question in all these cases is one of intention: Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land?"

If the answer to this question is in the affirmative then the occupier will be held to be a licensee. Counsel for the appellant contended that it was only where there was no written agreement that the intention of the parties should be gathered from the surrounding circumstances and the conduct of the parties but that where there was a written agreement the court should look not so much at the words of the agreement as the substance of the agreement. I do not think that he intended to go so far as to suggest that the surrounding circumstances and the conduct of the parties should be completely ignored. As Denning L.J. said in *Errington* v. *Errington*: [4]

"Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege, with no interest in the land, he will be held to be a licensee only".

It should be noted that the agreement between the respondents and Goh Eng Wah, who was the successful tenderer for the grant of a licence, refers throughout to the creation of a licence and nothing else, and that the parties are referred to throughout that agreement as "licensor" and "licensee" respectively.

The arguments in support of the appellant's contention may be summarised as follows:—

(i) That Goh Eng Wah, the licensee under the agreement, had exclusive possession of the land and premises in question until the expiration of the agreement at the end of five years. He was empowered by the agreement to "enter upon and use" the said land and premises for an amusement park, fair or playground and at the determination of the licence he was, by his covenant, bound to deliver up the amusement park with the fixtures and additions thereto in good repair and condition. It was, therefore, contended that this was exclusive possession which gave him a lease;

(ii) whereas, in a licence, no interest in land passes to the licensee and no right in rem is thereby created, in the present case Goh Eng Wah acquired an interest in land because he was empowered to charge and collect admission fees to the park and to collect all licence fees in respect of the buildings and erections on the said land and premises. By virtue of this right to collect moneys arising "by way of a profit issuing out of the land", he was the holder of an interest in land and, therefore, a tenant and not a licensee. Many cases referring to profits *a prendre* were cited in support of this proposition; and

(iii) the language of the original lease dated 31st December, 1964, which was submitted to the court for approval and was disapproved on the ground that the trustees had no power to grant a lease, used almost the same language as some covenants in the present licence and, therefore, the licence, although it was called a licence, was in substance and effect a lease. Mr. Hoalim proceeded to compare the covenants in the respective documents and Mr. N. A. Mallal (for the respondents) accepted as a fact that there was a great resemblance between them. There is, as will appear later, little merit in this particular submission and I shall now deal with the question of exclusive possession.

It was contended on the appellant's behalf that the expressions "to enter upon and use" and "deliver up" were sufficient to show exclusive possession and counsel cited *Roads* v. *The Overseers of Trumpington* [5] in support of this proposition. It should be noted, however, that Blackburn J., whilst holding that these words clearly show an intention to give a right of exclusive occupation, nevertheless added that if the landlord had to do anything on the land, as to drain it, such facts might show that the possession remained in the landlord. His Lordship went on further to hold that, even without such strong words as "enter upon" and "deliver up", the whole nature of the agreement showed that the grantee was intended to have exclusive possession of the land. The fact that the grantee was empowered to dig upon the land for coprolites and to raise them and later to restore the land to its original state seemed to weigh greatly with the learned judge who found that this seemed to give a right of constant and exclusive possession.

It should be observed that the mere grant of exclusive possession does not necessarily convert the grantee into a tenant although the fact of his being let into exclusive possession is *prima facie* evidence of an intention to create a tenancy. This, however, may be negatived.

It is also established law that the relationship between the parties is determined by the law and not by the label which parties to a contract choose to put on it. This proposition is borne out in Lord Justice Denning's judgment in *Facchini* v. *Bryson.*[6] That was a case in which the occupation had all the features of a service tenancy which was so construed notwithstanding a clause to the effect that "nothing in the agreement shall be construed to create a tenancy".

In *The Queen* v. *Morrish,* by agreement between the Royal Commissioners for the Exhibition of 1862 and Morrish, the latter acquired a right to sell refreshments at the exhibition, to fit up the space allotted to him with counters and fittings, to provide cellars and to lay on gas and water. He was to be subject to the bye-laws and regulations made by the commissioners. All fittings and erections made by Morrish were to become the property of the commissioners. It was held that he was not in exclusive occupation of the space so allotted to him. Blackburn J. at page 249 of this report said that "the clause compelling the appellant to put up an office and to keep therein at all times a representative for the purpose of receiving communications from the commissioners goes also to show that there was no exclusive occupation".

A covenant imposing a similar restraint is to be found in the agreement before me, i.e. in covenant (xiv) of clause 3 thereof where the licensee covenants to "permit the licensor or his agents at all hours to enter the park to see that the terms of this licence are being observed or carried out and in that connection to permanently reserve a table in the office of the amusement park for use by the licensor or his agents". In my opinion such a covenant shows that Goh Eng Wah was, as in the case of *Morrish, supra,* never intended to have exclusive possession of the said land and premises. Further, covenants (vii), (viii), (ix) and (xx) in the same clause relating to the keeping by the licensee of such books of account and records as may be required to be kept under the law, to observe and conform to all the rules and regulations from time to time made by the licensor for the management of the amusement park, to discharge any servant of the licensee who shall be guilty of any conduct considered by the licensor to be prejudicial to the proper management of the park, to keep the park open and lighted every night up to 12 mid-night, etc., make it difficult for me to accept the submission on behalf of the appellant that Goh Eng Wah was granted exclusive possession under the agreement. These are not minor restrictions such as one does come across in leases but, to my mind, strongly indicate that the control and supervision of the said land and premises remain in the trustees, as licensor, and no one else.

In *Smith* v. *Lambeth Assessment Committee* there was a power reposed in the landlord to exercise control over the employees of the tenants who were liable to immediate removal by the landlord in case of insobriety or misconduct. Here again, despite the fact that the indenture referred to the appellants as tenants, it was held that they did not have exclusive occupation. Clause 3 of the agreement reserves a similar power to the trustees to dismiss employees of the licensee.

In addition to the licensee's covenants to which I have referred there are other covenants also which tend to show the measure of control reserved to the licensor to which I think I need not here refer.

I now turn to another clause in the agreement. A most significant provision which, to my mind, clearly distinguishes it from a lease is contained in clause 5 thereof. Apart from paragraphs (i) and (ii) thereof as to the right on the part of the licensor to determine the licence on seven days' notice in certain circumstances, and to issue free passes to the park, which are inconsistent with a lease, paragraph (iii) states—

> "This licence shall determine on the death or bankruptcy of the licensee in the case of an individual and on winding up in the case of a limited liability company".

A provision such as this clearly seems to show that a lease was never intended. Such a provision is not only inconsistent with but repugnant to a lease or tenancy.

It is well known that in the case of a tenancy neither death nor bankruptcy work an automatic termination thereof. On bankruptcy, for example, the Official Assignee steps into the bankrupt's shoes (though he may disclaim an onerous tenancy).

There now remains a final question for determination, i.e. whether any interest in the said land and premises passes to the licensee under the agreement. It was argued that, by virtue of the licensee's right to collect admission fees to the park and to collect licence fees from other occupiers or users of the said land and premises, he would be making a profit "issuing out of the land" and that therefore, the agreement grants an interest in land. Counsel for the appellant cited a number of authorities relating to profits *a prendre* although he did not submit, in so many words, that this was such a profit.

In my judgment there is a clear distinction between a profit *a prendre* and a profit such as has been said arises out of the use of the land in the present case.

Mr. Mallal stressed that a profit *a prendre* must be a right to take something out of the land itself whereas in the present case no such right is conferred on the licensee whose only profit may

arise out of the use of the land but does not *arise out of the land itself.* As *Megarry and Wade* have pointed out in their 2nd Edition of the *Law of Real Property* at page 785 —

"A profit *a prendre* has been described as 'a right to take something off another person's land.' This it is, but not all such rights are profits. If the right is to be a profit, the thing taken must be either part of the land, e.g., minerals or crops, or the wild animals existing on it; and the thing taken must at the time of taking be susceptible of ownership. A right to 'hawk, hunt, fish and fowl' may thus exist as a profit, for this gives the right to take creatures living on the soil which, when killed, are capable of being owned. But a right to take water from a spring or a pump, or the right to water cattle at a pond, may be an easement but cannot be a profit; for the water, when taken, was not owned by anyone nor was it part of the soil."

It is clear that the right to collect admission fees and licence fees in respect of the land in question does not fall within any of the known categories of profits *a prendre* because no right to take anything out of the said land is given to the licensee. What he is entitled to do is to collect these fees and thereby to make a profit for himself in the lay sense of the term. He does not take anything out of the land itself. As *Stroud's* Judicial Dictionary of Words and Phrases, 3rd Edition, page 2324, succinctly provides —

" 'The profit must be something out of the land itself,' as distinguished from making a profit by the use of the land; 'and it is because it is something out of the land itself that a LICENCE to a profit *a prendre* has been held to be within the Statute of Frauds as being an interest in land,' e.g. to hunt or shoot game and take it away."

I find, therefore, that the agreement does not confer any licence to a profit *a prendre* on the licensee. It should be noted that even a licence to a profit *a prendre* may not necessarily give the licensee exclusive possession of the land. It is only if he does get such exclusive possession that any question of the licence being construed to be a lease will arise. In the circumstances of the present case both factors are missing, i.e. no profit of the nature of a profit *a prendre* is conferred on the licensee and, as I have found earlier, no exclusive possession of the said land and premises has been conferred on the licensee.

In view of my findings above I do not think that I need deal with such fascinating cases as were cited, involving the sale of refreshments at a theatre (*Frank Warr & Co. Ltd.* v. *London County Council,*[7]) the front of the house rights of a theatre (*Clore* v. *Theatrical Properties Ltd., & Westby & Co. Ltd.,*[8]) where the rights conferred were held to evidence a licence and nothing else in each case.

In conclusion I should like to add that the licensee, Goh Eng Wah, has categorically affirmed that so far as he is concerned the agreement constitutes a mere licence and in no way creates a tenancy in his favour of the said land and premises and has consented to the respondents' application for approval of the agreement by the court.

Where the intention of the parties is clear not only from the document itself but from their conduct and the surrounding circumstances it would, as *Megarry* points out at page 52 in the 9th Edition of his Rent Acts, be wrong for the court to extract from the grantor an estate or interest in land in the teeth of such intention.

The appeal is, therefore, dismissed.

Tan Ah Tah F.J.: I agree.

Chua J.: I agree.

Appeal dismissed.

Solicitors: *Philip Hoalim & Co.; Mallal & Namazie.*

BRITISH AND MALAYAN TRUSTEEES LTD. v. ABDUL JABBAR & ANOR. AND KADER MAIDEEN & ANOR.

[O.C.J. (Winslow J.) March 23, 1966]

[Singapore — Consolidated Suits No. 677 of 1963 and No. 1216 of 1963]

Landlord and Tenant — Space in pillar in common passageway — Agreement of tenancy — Whether creates licence or tenancy — Termination.

By a written agreement, the defendant was granted a monthly tenancy of premises described as "second pillar on the right hand side of the arcade from the entrance from Raffles Place, 6 feet high, 4 feet wide and 8 inches depth". The plaintiffs claimed a declaration that the right of the defendant had been determined.

Held: the agreement, notwithstanding that it was on a printed form used for tenancies and described the parties as landlord and tenant, did not create a tenancy but a contractual licence terminable by one month's notice in writing given by other party.

Cases referred to:—

(1) *Commissioners of Customs and Excise* v. *Poole Finance* [1952] 1 T.L.R. 793.

(2) *Facchini* v. *Bryson* [1952] 1 T.L.R. 1386.

(3) *Rendell* v. *Roman & Anor.* (1893), 9 T.L.R. 192.

(4) *Hancock* v. *Austin* 14 C.B.N.S.; 143 E.R. 593.

CIVIL SUITS.

D. G. Ironside for the plaintiffs.

J. Tan Chor Yong for the defendant.

Cur. Adv. Vult.

Winslow J.: The plaintiffs apply, in this consolidated action, for a declaration that the right of the defendants in Suit No. 677 of 1963 to use a space in the common passageway in the Arcade has been determined and also for an injunction to restrain the defendants in both Suits from continuing to use a space 9 feet high, 14 feet 8 inches wide and 4 feet 8 inches deep